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TIMOTHY FERNANDEZ,

Case No. DISM-00-0021

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

Respondent.

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held on November 30 and December 1, 2000, in the Department of Transportation Maintenance Building in Port Angeles, Washington.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, gross misconduct and willful violation of published regulations and policies. Respondent alleged that while driving a state owned vehicle, Appellant disobeyed an order given to him by a Washington State Patrol (WSP) trooper, was placed in custody by the WSP, and following a search by the WSP, was found to have in his possession a brass pipe containing the residue of marijuana.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Timothy Fernandez was a Natural Resources Worker II and permanent employee of Respondent Department of Natural Resources (DNR). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on March 20, 2000.

2.2 Appellant had been employed by DNR for over 27 years. He had a good employment record and received good performance evaluations. As a Natural Resources Worker II, Appellant worked independently in the field and was assigned a state-owned 4x4 pickup truck with high ground clearance. Appellant routinely used the truck on logging roads and while performing his assigned work duties occasionally drove the truck through areas covered with water. Appellant was authorized to use his state-owned vehicle for travel between his home and his work locations. Because Appellant was not given close supervision, the agency placed a high level of trust in his integrity and held him to a high level of accountability.

2.3 Appellant was aware of the agency's drug-free workplace policy and he was aware of his responsibility to operate his state-owned truck in a safe and responsible manner. In addition, Appellant's training profile establishes that Appellant attended ethics training and defensive driving training.

1 2.4 By letter dated February 17, 2000, Kaleen Cottingham, Deputy Commissioner, informed
2 Appellant of his dismissal effective at the close of business March 6, 2000. Ms. Cottingham
3 charged Appellant with neglect of duty, gross misconduct and willful violation of published
4 regulations and policies.

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6 2.5 In summary, Ms. Cottingham alleged that while driving a state-owned vehicle, Appellant:

- 7 • refused to obey a lawful order given to him by a Washington State Patrol (WSP) trooper,
- 8 • failed to promptly pull over when he was pursued by the WSP,
- 9 • misused a state-owned vehicle,
- 10 • failed to comply with the prohibition on possession of illegal drugs while at work, and
- 11 • more likely than not, either smoked marijuana in or around a work site or came to a work
12 site while under the influence of marijuana.

13 2.6 The incidents giving rise to this appeal occurred on December 15, 1999, on State Route 112
14 near milepost 24. On that day, the area of the incident experienced unusually heavy rainfall. As a
15 result, the Physt River that flows next to State Route 112 overflowed its banks and flooded the road.

16 2.7 The road was closed and WSP troopers were posted near milepost 24 at the location of the
17 flooding. Appellant's residence is located near milepost 26.4 on State Route 112. The credible
18 testimony establishes that during times of heavy rainfall, the local residents are accustomed to State
19 Route 112 flooding in this area. When this happens, the local residents are typically allowed
20 access to their homes even when the road is closed. None of the witnesses who testified before the
21 Board could recall a time when the WSP was posted at the site of flooding.

22
23 2.8 After completing his work for the day, Appellant proceeded to drive to his residence in the
24 state-owned pickup truck via State Route 112. When he arrived near milepost 24, he saw that two
25 WSP troopers were posted at the area. They had their cars stopped with the emergency lights
26 flashing. Appellant stopped the truck and talked with Trooper Travis Beebe.

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2 2.9 A preponderance of the credible testimony and evidence establishes that the following
3 events occurred.

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5 2.10 Trooper Beebe told Appellant that the road was closed and dangerous and that he would not
6 allow Appellant to proceed through the flooded area. Trooper Beebe told Appellant he could wait
7 until the water receded. Appellant told Trooper Beebe that he did not have the authority to stop
8 him. Trooper Beebe again told Appellant that he could not drive through the area. Appellant then
9 said, "That's bullshit. Watch me," and drove past Trooper Beebe and through the flooded area of
10 the roadway.

11
12 2.11 Trooper Allen Nelson observed the interaction between Appellant and Trooper Beebe.
13 When Appellant disobeyed Trooper Beebe, Trooper Nelson pursued him through the flooded
14 roadway. After Appellant got to the far side of the flooded area, he noticed that Trooper Nelson
15 was behind him with his lights flashing. Appellant pulled over and stopped as soon as he found a
16 wide, safe area along the road side in which to do so.

17
18 2.12 Trooper Nelson called for backup and Trooper Beebe responded. Appellant and Trooper
19 Nelson were engaged in conversation when Trooper Beebe arrived to lend assistance. Trooper
20 Thomas Anderson heard Trooper Nelson requesting backup on the radio and he proceeded to the
21 area. When he arrived, Appellant and the Troopers Nelson and Beebe were standing outside of
22 their vehicles. Trooper Nelson described to Trooper Anderson what had occurred. Trooper
23 Anderson directed Trooper Nelson to handcuff Appellant. After Appellant was placed in the cuffs,
24 Trooper Nelson frisked him and found a brass marijuana pipe in his pocket. Trooper Anderson
25 credibly testified that Appellant said he had forgotten about the pipe in his pocket and something to
26 the effect that he had smoked some during work. Appellant did not appear to be intoxicated.

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2 2.13 Appellant was arrested, his state-owned truck was searched and Appellant's supervisor was
3 called to remove the truck from the area.

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5 2.14 At the outset of the hearing, the parties stipulated to the following fact:

6 Residue in the brass pipe was analyzed by the Washington State Patrol Crime
7 Laboratory and was found to contain marijuana.

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9 2.15 On direct examination, Appellant credibly testified that Trooper Nelson pursued him
10 because he defied the troopers.

11
12 2.16 Either on the evening of December 15, 1999 or the following morning, the Olympic Region
13 Manager alerted Ms. Cottingham to the situation and to the potential for negative media attention
14 because of the involvement of a DNR vehicle and drug paraphernalia. Appellant was subsequently
15 placed on administrative leave.

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17 2.17 By letter dated January 6, 2000, Ms. Cottingham served Appellant with a pre-disciplinary
18 notice and provided Appellant with copies of the documents she was considering. Appellant was
19 provided an opportunity to respond to the charges in the pre-disciplinary letter. Appellant
20 responded in writing by letter dated February 7, 2000.

21
22 2.18 Prior to determining the level of discipline to impose, Ms. Cottingham reviewed Appellant's
23 personnel file, considered Appellant's character reference, and considered Appellant's response to
24 the charges. Ms. Cottingham determined that the egregious nature of Appellant's deliberate actions
25 negated his good employment history. She concluded that Appellant violated state regulations and
26 policies, including the agency's no-tolerance policy on drug use, violated the trust the agency placed

1 in him, and damaged the professional image of the agency with its partners in law enforcement and
2 its reputation with the public. Ms. Cottingham determined that Appellant deliberately defied the
3 WSP's authority, abused a DNR vehicle, more probably than not was under the influence of
4 marijuana while at work, and damaged the reputation of the agency. Ms. Cottingham determined
5 that dismissal was the appropriate disciplinary sanction.

6 7 **III. ARGUMENTS OF THE PARTIES**

8 3.1 Respondent argues that Appellant failed to obey the lawful order of the WSP trooper and
9 deliberately drove his state truck onto a dangerous, flooded roadway. Respondent further argues
10 that Appellant was belligerent to the troopers, failed to stop promptly when he was pursued, was
11 uncooperative when he did stop, and was found to have a marijuana pipe in his pocket. Respondent
12 asserts that when the pipe was found, Appellant informed the troopers that he had smoked "some,"
13 meaning marijuana, that day. Respondent contends that more likely than not and considering
14 Appellant's comment to the WSP troopers, Appellant either smoked marijuana during work or came
15 to work under the influence. Respondent further contends that Appellant admitted to smoking
16 marijuana off duty which violated the law. Respondent argues that Appellant blatantly disregarded
17 the law, intentionally, unilaterally, and belligerently defied the WSP and irreparably violated the
18 trust placed in him by the agency. Respondent asserts that the egregious and deliberate nature of
19 Appellant's misconduct warrants nothing less than termination.

20 3.2 Appellant admits that he smokes marijuana on occasion when he is off work. Appellant
21 denies the assertion that he smoked at or prior to work and argues that there is no evidence that he
22 was under the influence at the time of the incident. Appellant argues that the road was open for
23 local traffic, that he had driven through the same area under similar circumstances in the past, and
24 that the WSP trooper merely advised him of the high water and did not order him not to proceed.
25 Appellant asserts that he did not drive in a dangerous or reckless manner. Appellant contends that
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1 he did not notice that he was being pursued until he reached the other side of the flooded area and
2 had begun to accelerate. Appellant further contends that when he noticed the WSP, he pulled over
3 as soon as possible. Appellant asserts that he exited his vehicle voluntarily and that he cooperated
4 with the WSP. Appellant admits that he may have exercised poor judgment. However, in light of
5 his exemplary employment record and considering the many discrepancies surrounding this
6 incident, Appellant contends that he should not have been terminated.

7 8 IV. CONCLUSIONS OF LAW

9 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
10 herein.

11 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
12 the charges upon which the action was initiated by proving by a preponderance of the credible
13 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
14 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
15 Corrections, PAB No. D82-084 (1983).

16
17 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
18 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
19 of Social & Health Services, PAB No. D86-119 (1987).

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21 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
22 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

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24 4.5 Willful violation of published employing agency or institution or Personnel Resources
25 Board rules or regulations is established by facts showing the existence and publication of the rules
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1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &
3 Health Services, PAB No. D93-053 (1994).

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5 4.6 Respondent has met its burden of proving that Appellant neglected his duty, committed
6 gross misconduct and willfully violated agency policies. Respondent has proven by a
7 preponderance of the credible evidence that Appellant refused to obey a lawful order given to him
8 by Trooper Beebe, possessed illegal drug paraphernalia while at work, and more likely than not,
9 smoked marijuana in or around a work site on December 15, 1999. Furthermore, Appellant has
10 irreparably damaged the trust the agency placed in him.

11
12 4.7 Respondent failed to prove that Appellant failed to promptly pull over when he was pursued
13 by the WSP or that he misused a state-owned vehicle.

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15 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to
16 the facts and circumstances including the seriousness and circumstances of the offense. The penalty
17 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
18 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.
19 An action does not necessarily fail if one charge is not sustained unless the entire action depends on
20 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

21
22 4.9 In spite of Appellant's exemplary employment history, dismissal is not too severe in light of
23 the flagrant nature of his wrongdoing. Appellant's willful violation of the agency's drug-free
24 workplace policy and his deliberate defiance of Trooper Beebe's order were egregious acts of gross
25 misconduct and warrant the most severe disciplinary sanction. Therefore, the appeal should be
26 denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Timothy Ferenandez is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Walter T. Hubbard, Chair

Gerald L. Morgen, Vice Chair

Leana D. Lamb, Member